FILED BY CLERK
APR 30 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LOUIS ALVIN YOUNG, Appellant.	2 CA-CR 2009-0141 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083486

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean
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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Louis Young was convicted of four counts of aggravated driving under the influence of intoxicating liquor (DUI), for which he was

sentenced to concurrent, enhanced, ten-year prison terms. Young challenges his convictions, arguing the prosecutor's reference during trial to his invocation of his right to remain silent constituted fundamental, prejudicial error. We affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In the early morning of August 31, 2008, Pima County sheriff's deputy Dixon was patrolling traffic in the area of Fairview Avenue and Wetmore Road in Tucson. He observed a vehicle traveling "with only its running lights on," so he followed it through an intersection and activated his overhead lights. When the vehicle failed to stop, Dixon activated his siren and called for backup. Young, the driver of the vehicle, pulled over in a parking lot approximately one-quarter of a mile later.

¶3 As Dixon got out of his patrol car, he saw what was later determined to be a partially empty can of beer fall from the passenger-side window and heard a "thumping noise." When Dixon asked Young for his driver license, Young gave him an identification card but was unable to produce the license. Dixon detected an odor of intoxicants coming from inside the vehicle and noticed Young had watery, bloodshot eyes. Young admitted having had two beers, and Dixon asked him to step out of the vehicle.

¶4 As Young walked to the rear of his car, "he was leaning against the vehicle with his left hand" to support himself. Dixon administered a horizontal gaze nystagmus (HGN) test, and Young exhibited all six cues of impairment. He also exhibited multiple

signs of impairment on the walk-and-turn and one-leg-stand field sobriety tests. Young agreed to take a preliminary breath test, which showed the presence of alcohol. Dixon then arrested Young and informed him of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and of the implied-consent provisions of Arizona law. Young submitted to a blood test, which revealed an alcohol concentration of .246.

¶5 A grand jury indicted Young for one count of aggravated DUI while his license was suspended or revoked; one count of aggravated driving with an alcohol concentration of .08 or greater while his license was suspended or revoked; one count of aggravated DUI with two or more prior DUI convictions; and one count of aggravated driving with an alcohol concentration of .08 or greater with two or more prior DUI convictions. It also indicted him for tampering with physical evidence for having attempted to hide or destroy one of the blood samples taken during the blood draw. A jury convicted Young of the DUI offenses but acquitted him of the tampering charge. The trial court sentenced him as noted above, and this timely appeal followed.

Discussion

¶6 Young contends the state improperly introduced evidence that he had invoked his right to remain silent. He acknowledges he failed to raise this issue below and therefore it is subject only to fundamental-error review. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental

error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶7 "Due process demands that the state refrain from introducing testimony reflecting that a defendant had invoked his or her right to remain silent." *State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150, 1153 (App. 2002). "This rule 'rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000), *quoting Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). Here, after eliciting testimony from Dixon that he had read the *Miranda* warnings to Young and that Young had understood them, the prosecutor asked, "Did [Young] say that he would answer your questions?" Dixon responded, "No[,] he did not." Assuming, as Young contends, this exchange constituted a comment on his invoking his right to remain silent, and assuming the error was fundamental, Young also has the burden of establishing prejudice. *Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608-09.

¶8 Young asserts he was prejudiced by the error because, in addition to "deliberate[ly] and willful[ly]" eliciting the improper testimony, the prosecutor "drew additional attention to the invocation by commenting both in opening statement and closing argument that . . . Young had slurred speech, which would [have] be[en] highly likely to cause the jury to associate the invocation . . . with the asserted fact that [his] speech was slurred, and [to infer] that the reason for the invocation was because [he]

knew his speech was indicative of intoxication." The record does not support this novel argument.

¶9 During her opening statement, the prosecutor informed the jurors they would hear evidence that Dixon had noticed Young's speech was slurred. However, this evidence was never elicited during trial. Then, during closing arguments the prosecutor stated, "Deputy Dixon testified that there was an odor [of alcohol] coming from the defendant. And you know that he had slurred speech and red, watery, bloodshot eyes and he was driving without headlights." Defense counsel immediately objected to the mention of slurred speech and moved for a mistrial. The trial court agreed such evidence had not been admitted during trial. It ordered "the remark . . . about slurred speech" stricken from the record and instructed the jury to disregard it, but it denied the motion for a mistrial.

¶10 As the state points out, there is not inherently a "logical nexus . . . between [Young]'s slurring his speech and his invoking his right to remain silent." And at no time did the prosecutor state or imply Young had invoked his right to remain silent to avoid slurring his speech in the officer's presence. Indeed, Young did not refuse to speak entirely—he spoke to Dixon when asked to provide his license; he told Dixon he had consumed two beers; and he stated he had received no injuries to his head or eyes that could have affected the HGN test and had no medical conditions that would affect his performance on the field sobriety tests. And the prosecutor's improper statement, which the jurors were instructed to disregard, is not evidence that the prosecutor intended the jury to infer guilt from Young's exercise of his right to remain silent. *See State v.*

Dunlap, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996) (jurors presumed to follow instructions).

¶11 The cases Young cites to support his argument are distinguishable. In each, the prosecutor had argued explicitly to the jury that the defendant's silence was evidence of his guilt. *See State v. Sorrell*, 132 Ariz. 328, 329, 645 P.2d 1242, 1243 (1982) (error fundamental and reversible when state commented during opening and closing on defendant's invocation of right to remain silent and elicited testimony from witness); *State v. Palenkas*, 188 Ariz. 201, 213, 933 P.2d 1269, 1281 (App. 1996) (error not harmless when "inference of guilt . . . was strongly argued in . . . closing comments, despite numerous prior defense objections . . . and despite a pretrial *in limine* order"); *State v. Keeley*, 178 Ariz. 233, 235, 871 P.2d 1169, 1171 (App. 1994) (error reversible when record established "comments about [defendant]'s post-*Miranda* silence were a deliberate trial strategy by the prosecutor").

¶12 Here, the "testimony consisted of no more than a brief reference to [Young's right to remain silent]," and "the [prosecutor's] question and [the] answer [elicited] did not necessarily suggest to the jury that [Young] was guilty because he had invoked his right to [remain silent] during police questioning." *See Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079. Also, there is no evidence the statement "was elicited as the result of willful misconduct by the prosecutor." *See id.*

¶13 Moreover, the state presented overwhelming evidence that Young had committed the DUI offenses. He stipulated that he had prior DUI convictions, and the Motor Vehicle Division (MVD) records custodian testified that Young had been notified

personally of his license suspension and had been mailed notice of the revocation. Officer Dixon testified he had observed Young driving; Young's eyes had been watery and bloodshot, and he had emitted an odor of alcohol; there were two unopened cans of beer in the car, and Young had thrown an open can out the passenger-side window; he displayed multiple cues of impairment on the field sobriety tests; the preliminary breath test was positive for the presence of alcohol; and his blood alcohol content was determined to be .246.

¶14 At trial, Young challenged the accuracy of the MVD records, field sobriety tests, and blood alcohol analysis. His credibility and state of mind were not central to the case, and the improper comment did not strike at the heart of Young's defense. *See Palenkas*, 188 Ariz. at 214, 933 P.2d at 1282 (noting, in evaluating gravity of comment on defendant's right to remain silent, credibility and state of mind central to defense where facts of incident in dispute). Thus, although the prosecutor's question improperly elicited from Dixon a reference to Young's invocation of his right to remain silent, in light of the overwhelming evidence of Young's guilt and the defense he presented, we cannot say this single reference constituted fundamental, prejudicial error.

Disposition

¶15 For the reasons set forth above, we affirm Young's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge